

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANNALIZA ELLORIN,

Plaintiff,

v.

APPLIED FINISHING, INC., et al.,

Defendants.

CASE NO. C12-1932JLR

ORDER ON MOTIONS FOR
SUMMARY JUDGMENT

I. INTRODUCTION

Before the court are: (1) Defendant Applied Finishing, Inc.'s ("Applied Finishing") motion for summary judgment (AF Mot. (Dkt. # 21)), and (2) Defendant Michael Soden's motion for summary judgment (Soden Mot. (Dkt. # 22)). The court has considered the motions, all submissions filed in support of and opposition thereto, the

1 balance of the record, and the applicable law.¹ Being fully advised the court GRANTS in
 2 part and DENIES in part both motions as discussed below.

3 II. BACKGROUND

4 In this lawsuit, Plaintiff Annaliza Ellorin brings federal and state law claims
 5 alleging that Mr. Soden sexually harassed her and discriminated against her, and that her
 6 employer, Applied Finishing, did not take reasonable steps to investigate the harassment
 7 or ensure the implementation of appropriate corrective actions.

8 Ms. Ellorin immigrated to the United States in 1988 from the Philippines. (Ellorin
 9 Decl. (Dkt. # 34) ¶ 1.) She can speak and understand some English, but does not
 10 consider herself to be fluent. (*Id.* ¶ 3.) Applied Finishing is a business that paints metal
 11 and plastic parts for the aerospace industry. (R. Bickle Decl. (Dkt. # 24) ¶ 1.) The
 12 company is located in Mukilteo, Washington, and is owned by Randy and Pam Bickle
 13 and Mike and Heather Alligood. (*Id.*) Mr. Soden is the operations manager at Applied
 14 Finishing. (Barnes Decl. (Dkt. # 30) Ex. A (“Bickle Dep.”) at 12:10-14; Ex. B (“Soden
 15 Dep.”) at 23:19-20.)

16 Ms. Ellorin worked at Applied Finishing from mid-October 2011, to January 22,
 17 2012, through Express Personnel Service. (Ellorin Decl. ¶ 2.) She became a full-time
 18 employee directly with Applied Finishing on January 22, 2012, and worked there until
 19 May 3, 2013. (*Id.*) Ms. Ellorin’s job entailed masking parts before they were painted.
 20 (*See id.* ¶¶ 2-3; Barnes Decl. Ex. D (“Ellorin Dep.”) at 8-10.) She worked at an open

21
 22 ¹ No party requested oral argument on either motion, and the court deems both motions to
 be appropriate for decision without it.

1 table with five other women employees who were also masking parts. (Ellorin Dep. at 8-
2 10, 12, 34-36.) With the exception of “a couple” of men, the majority of employees in
3 the masking and packaging area of Applied Finishing’s facility are women. (Bickle Dep.
4 at 13:22-14:5.)

5 Applied Finishing hired Mr. Soden to manage operations, including facility
6 management. (Soden Decl. (Dkt. # 23) ¶ 2.) In this position, Mr. Soden assists in setting
7 up production lines and establishing workforce requirements. (Bickle Dep. at 12:18-24.)
8 Mr. Soden maintains that his duties do not include hiring, firing, directing, or in any other
9 way managing or supervising any employees. (Soden Decl. ¶ 2; Soden Dep. at 23:23-
10 24:9.) Mr. Randy Bickle, the president of Applied Finishing and one of its owners, also
11 maintains that Mr. Soden does not supervise or manage any employees. (*See* Bickle Dep.
12 at 12:23-24 (“[Mr. Soden] didn’t supervise or manage any employees.”).)

13 Nevertheless, there is conflicting testimony about Mr. Soden’s involvement in
14 supervising others at Applied Finishing. Some employees have testified that he
15 supervised their work at least to some degree. (*See, e.g.*, Gillum Decl. (Dkt. # 26) ¶ 3;
16 *see also* Ellorin Decl. ¶ 4.) Further, contrary to Mr. Soden’s testimony, Mike Alligood,
17 the production manager and one of the company’s owners, testifies that Mr. Soden has
18 participated in hiring employees. (Barnes Decl. Ex. C (“Alligood Dep.”) at 6:3-4 (“Q:
19 Has [Mr. Soden] participated in the hiring of employees? A: Yes.”); *see also id.* at 5:18-
20 6:2; 6:5-10:9.) Further, Mr. Alligood testifies that, although Mr. Soden does not have
21 direct authority to terminate an employee, he could “voice his opinion” or recommend the
22

1 termination of an employee, and in fact has commented on employees and their
2 performance. (Alligood Dep. at 10:4-13.)

3 Ms. Ellorin states that she was initially hired in a masking production and quality
4 assurance position. (Ellorin Decl. (Dkt. # 34) ¶ 2.) She testifies that Mr. Alligood told
5 her that he wanted her learn the facility first, and that once she had done so, she could
6 move into the quality assurance position. (*Id.*) Ms. Ellorin testifies that Mr. “Soden was
7 the manager, and he would instruct the employees in masking and packaging . . . and
8 give . . . instructions on a daily basis.” (*Id.* ¶ 4; *see also* Gillum Decl. (Dkt. # 26) ¶ 3
9 (“Mike Soden does not have authority over the Production team, including maskers,
10 although initially, he would sometimes tell the maskers how to do their work on
11 particular projects he was overseeing.”).)

12 Ms. Ellorin immediately saw Mr. Soden “being overly friendly” with some
13 women employees and “greeting them with hugs.” (*Id.*) Three weeks after Ms. Ellorin
14 began full-time employment with Applied Finishing, Mr. Soden approached her and
15 asked her to join him for a drink after work. (*Id.* ¶ 5.) She declined. (*Id.*)

16 Ms. Ellorin states that in her interactions with Mr. Soden, he would touch her
17 hand, grab it tightly, or rub her arms. (*Id.* ¶ 6.) She testifies that Mr. Soden would “find
18 a reason to touch [her] on a daily basis” and “would stand so close that it would make
19 [her] uncomfortable” and make it “difficult to concentrate on [her] work.” (*Id.*) Once as
20 he walked by, Mr. Soden blew Ms. Ellorin a kiss. (*Id.* ¶ 6.)

1 Ms. Ellorin also testifies that Mr. Soden would touch her coworker, Martha, on her
2 arms and hands (*id.* ¶ 7), and she was told he had slapped another coworker on her
3 buttocks and afterwards was “very flirty” (*id.* ¶ 11).

4 During the first week of March 2012, Ms. Ellorin testifies that Mr. Soden asked
5 her to go out with him for a second time. (*Id.* ¶ 10.) She declined the invitation again,
6 but testifies that Mr. Soden “continue[d] to touch and rub [her] as he came around with
7 increasing frequency.” (*Id.*) During the same month, Mr. Soden surprised Ms. Ellorin by
8 standing behind her when she was unaware of his presence and breathing on the back of
9 her neck. (*Id.* ¶ 12.) When she turned around, she found Mr. “Soden blowing air on
10 [her] neck and in [her] ear while standing up close and sniffing [her].” (*Id.*) She was
11 startled by Mr. Soden’s behavior and screamed loudly. (*Id.* ¶ 12.) Ms. Ellorin states that
12 Michelle Gillum, who was Ms. Ellorin’s “lead,” saw Mr. Soden do this, asked Ms.
13 Ellorin if she was okay, and said, “I saw your reaction and what he did was not right.”
14 (*Id.*)

15 In late March or early April, Ms. Ellorin testifies that Mr. Soden told the staff that
16 she was such a good employee that she was “going to become the staff quality assurance
17 person” because Ms. LuAnn Wible needed her help. (*Id.* ¶ 14.) Mr. Soden told Ms.
18 Ellorin to give her resume to Ms. Wible. (*Id.*) Ms. Ellorin testifies that Ms. Wible began
19 to train her in the position and that she began performing the job. (*Id.*)

20 Ms. Ellorin states that on May 11, 2012, on her way out the door, Mr. Soden said
21 to her: “Have a good weekend and don’t forget to scream my name loud tonight.” (*Id.*
22 ¶ 16.) Ms. Ellorin reported this and earlier events involving Mr. Soden to her husband.

1 (*Id.* ¶¶ 13, 16.) On May 14, 2012, Ms. Ellorin’s husband, Mr. Shawn Lee, called Applied
2 Finishing and reported Mr. Soden’s behavior to Mr. Bickle. (*Id.* ¶ 17.) Ms. Ellorin also
3 later reported all of the foregoing events to Mr. Bickle directly. (*Id.*)

4 Prior to the telephone call from Mr. Lee, Mr. Bickle testifies that Ms. Ellorin had
5 never complained to him or any of her other supervisors about Mr. Soden’s conduct. (R.
6 Bickle Decl. (Dkt. # 24) ¶ 4.) Indeed, Mr. Bickle states that Applied Finishing had never
7 received a complaint by any female employee concerning Mr. Soden or anyone else. (*Id.*
8 ¶ 3.) However, as noted above, Ms. Ellorin has testified that Ms. Gillum, her “lead,”
9 observed at least some of Mr. Soden’s behavior and told Ms. Ellorin that “what he did
10 was not right.” (Ellorin Decl. ¶ 12.)

11 Following his telephone conversation with Mr. Lee, Mr. Bickle met with Mr.
12 Soden and, without reaching a determination that Mr. Soden had been involved in sexual
13 harassment, counseled him about the company’s expectations concerning his conduct.
14 (*Id.*; *see also* Bickle Dep. at 32:17-36:13.)

15 In addition, Office Manager Pam Bickle also met with other female employees in
16 the plant to investigate whether other employees in the plant had any problems with Mr.
17 Soden. (P. Bickle Decl. (Dkt. # 25) ¶¶ 2-9.) Ms. Bickle testifies that almost all of the
18 women in the plant indicated that everything was fine and that they were not
19 uncomfortable with Mr. Soden or his behavior. (*See generally id.*) However, at least one
20 other woman, Ms. Wible, repeatedly complained about Mr. Soden’s behavior to Ms.
21 Bickle (*see id.* ¶¶ 4-5, 9) and another reported that Mr. Soden had “slapped her once on
22

1 the bottom” albeit prior to Mr. Bickle’s conversation with Mr. Soden about the
2 company’s expectations concerning his conduct (*id.* ¶ 7).

3 The day after Mr. Lee called Mr. Bickle to report Mr. Soden’s behavior, Ms.
4 Ellorin testifies that Mr. Soden blew her a kiss as she was on her way to her work area.
5 (Ellorin Decl. ¶ 18.) Three weeks later, another coworker informed Ms. Ellorin that Mr.
6 Soden “had touched her hands and arms and hugged her inappropriately.” (*Id.* ¶ 19.)
7 Ms. Ellorin also testifies that she overheard Mr. Soden asking another employee out. (*Id.*
8 ¶ 21.)

9 On August 20, 2021, Mr. Lee visited Applied Finishing, talked with Mr. Bickle a
10 second time, and reported Mr. Soden’s further conduct. (*Id.* ¶ 22; Lee Decl. (Dkt. # 37)
11 ¶¶ 5-6; R. Bickle Decl. ¶ 5; Ellorin Decl. ¶ 22.) Mr. Lee testifies that Mr. Bickle did not
12 say anything in response, but “just shook his head and listened.” (Lee Decl. ¶ 7.) Mr
13 Bickle testifies that he explained to Mr. Lee the steps he had taken to investigate the
14 complaint and to counsel Mr. Soden concerning his conduct. (*See* R. Bickle Decl. ¶ 5.)

15 Following the second conversation between Mr. Lee and Mr. Bickle, Ms. Ellorin
16 testifies that Mr. Soden “finally stopped his advances but he continued to give [her] angry
17 looks.” (Ellorin Decl. ¶ 22.) Nevertheless, Ms. Ellorin testifies that she was never given
18 the quality assurance position that she had been promised, and that the position went
19 instead to another employee, Antonio Martinez. (*Id.* ¶ 23.) Mr. Bickle, on the other
20 hand, denies that the quality assurance position was ever created—let alone filled by Mr.
21 Martinez instead of Ms. Ellorin. (R. Bickle Decl. ¶ 2.)
22

On May 3, 2013, Ms. Ellorin was laid off. (Ellorin Decl. ¶ 24.) Mr. Bickle indicates that Applied Finishing has laid off close to fifty percent of its workforce, and that Ms. Ellorin was laid off because she was the most junior worker in the masking department. (R. Bickle Decl. ¶ 2.)

III. ANALYSIS

In her complaint, Ms. Ellorin alleges four federal claims against both Mr. Soden and Applied Finishing under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, including (1) sex discrimination based on a hostile work environment (Compl. (Dkt. # 1) ¶¶ 32-37); (2) quid pro quo sexual harassment (*id.* ¶¶ 39-45); and (3) sexual discrimination based on differential treatment (*id.* ¶¶ 46-50); and (4) retaliation (*id.* ¶¶ 51-55). She also alleges these four claims against both Defendants under the Washington Law Against Discrimination (“WLAD”), chapter 49.60 RCW. (Compl. ¶¶ 78-101.) Ms. Ellorin alleges several other state law claims as well, including: (1) sexual battery (*id.* ¶¶ 56-62); (2) intentional infliction of emotional distress (*id.* ¶¶ 63-67); (3) negligent infliction of emotional distress (*id.* ¶¶ 68-72), and (4) negligent hiring against Applied Finishing only (*id.* ¶¶ 73-77). Applied Finishing and Mr. Soden have moved separately for summary judgment with respect to all of Ms. Ellorin’s claims and any punitive damages award. (*See generally* AF Mot.; Soden Mot.)

A. Standards

Federal Rule of Civil Procedure 56(a) requires the court to grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Entry of

1 summary judgment is appropriate “against a party who fails to make a showing sufficient
2 to establish the existence of an element essential to that party’s case, and on which that
3 party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322
4 (1986).

5 The movant bears the initial responsibility of informing the district court of the
6 basis for its motion, and identifying those portions of the pleadings, depositions, answers
7 to interrogatories, and admissions on file, together with the affidavits, which it believes
8 demonstrate the absence of a genuine issue of material fact. *Id.* at 323. A moving party
9 without the ultimate burden of persuasion at trial has both the initial burden of production
10 and the ultimate burden of persuasion on a motion for summary judgment. *Nissan Fire &*
11 *Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). If the
12 moving party meets its initial burden, the burden then shifts to the opposing party to
13 establish a genuine issue as to any material fact. *Matsushita Elec. Indus. Co. v. Zenith*
14 *Radio Corp.*, 475 U.S. 574, 586 (1986).

15 The purpose of summary judgment is to pierce the pleadings and to assess the
16 proof in order to see whether there is a genuine need for trial. *Id.* at 587. In resolving a
17 summary judgment motion, the evidence of the opposing party is to be believed,
18 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985), and all reasonable inferences
19 that may be drawn from the facts placed before the court must be drawn in favor of the
20 opposing party, *Matsushita*, 475 U.S. at 587.

21 Both the Ninth Circuit and Washington courts have set a high standard for
22 granting summary judgment in employment discrimination cases. Washington courts

1 have stated that summary judgment “should rarely be granted in employment
 2 discrimination cases.” *See e.g., Sangster v. Albertson’s, Inc.*, 991 P.2d 674, 677 (Wash.
 3 Ct. App. 2000).² The Ninth Circuit has cautioned that “very little evidence” is needed “to
 4 survive summary judgment in a discrimination case, because the ultimate questions is one
 5 that can only be resolved through a searching inquiry—one that is most appropriately
 6 conducted by the fact-finder, upon a full record.” *Schnidrig v. Columbia Mach, Inc.*, 80
 7 F.3d 1406, 1410 (9th Cir. 1996) (internal quotation marks omitted).

8 **B. Individual Liability under Title VII and WLAD**

9 Mr. Soden has moved for summary judgment on all of Ms. Soden’s claims under
 10 Title VII and WLAD as those claims pertain to him. He asserts that Title VII does not
 11 provide for individual liability on the part of employees and that WLAD is not applicable
 12 to non-supervisory employees. (Soden Mot. at 3, 11-12.)

13 **1. Mr. Soden’s Liability under Title VII**

14 To the extent that Ms. Ellorin is seeking to assert claims against Mr. Soden under
 15 Title VII (*see* Compl. (Dkt. # 1) ¶¶ 32-55), such claims are subject to dismissal because
 16 the statute does not provide for individual liability. In interpreting Title VII, the Ninth
 17 Circuit has held that the statute only applies to employers, not employees. *Miller v.*
 18 *Maxwell’s Int’l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993). “The statutory scheme itself
 19 indicates that Congress did not intend to impose individual liability on employees.” *Id.*

20
 21 ² However, in order to defeat summary judgment, the employee “must establish specific
 22 and material facts to support each element of her prima facie case.” *Marquis v. City of Spokane*,
 922 P.2d 43, 48 (Wash. 1996) (employee “must do more than express an opinion or make
 conclusory statements”).

1 “Title VII limits liability to employers with fifteen or more employees . . . because
 2 Congress did not want to burden small entities with the costs associated with litigating
 3 discrimination claims. If Congress decided to protect small entities with limited
 4 resources from liability, it is inconceivable that Congress intended to allow civil liability
 5 to run against individual employees.” *Id.* Thus, as a matter of law, Ms. Ellorin is barred
 6 from asserting any claim under Title VII against Mr. Soden. The court, therefore, grants
 7 Mr. Soden’s motion for summary judgment with regard to his personal liability under
 8 Ms. Ellorin’s Title VII claims. (Soden Mot. at 3.)

9 **2. Mr. Soden’s Liability under WLAD**

10 Mr. Soden also asserts that he is entitled to summary judgment with respect to Ms.
 11 Ellorin’s claims under WLAD because he was not acting in a supervisory capacity.
 12 (Soden Mot. at 11-12.) Under the WLAD, “individual supervisors, along with their
 13 employers, may be held liable for their discriminatory acts.” *Brown v. Scott Paper*
 14 *Worldwide Co.*, 20 P.3d 921, 928 (Wash. 2001) (“We hold individual supervisors, along
 15 with their employers, may be held liable for their discriminatory acts. The plain meaning
 16 of RCW 49.60.040(3), by its very terms, encompasses individual supervisors and
 17 managers who discriminate in employment.”). In so holding, the Washington Supreme
 18 Court noted that WLAD and Title VII “offer significantly different definitions of the term
 19 ‘employer’.” *Brown*, 20 P.3d at 926.³

21 ³ See e.g., *Marquis v. City of Spokane*, 922 P.2d 43, 50 (Wash. 1996) (interpretation of
 22 federal antidiscrimination statutes is persuasive unless the provisions in those statutes differ from
 those in chapter 49.60 RCW).

In order to be held personally liable under WLAD, a supervisor must have acted “in the interest of [the] employer.” *Brown*, 20 P.3d at 926; *see also Jenkins v. Palmer*, 66 P.3d 1119, 1121 (Wash. Ct. App. 2003) (under *Brown*, “managers and supervisors may be personally liable under WLAD when acting in their employer’s interest”). Washington decisions look to such persons’ involvement in the employment policy or decisions that result in discrimination and hold them liable for their own discriminatory acts. *Id.* at 926-28. Here, Mr. Soden was allegedly involved in fulfilling his job-related duties at the time much or all of the conduct at issue occurred. Further, as discussed below, the court concludes that there is an issue of fact concerning Mr. Soden’s supervisory status with respect to Ms. Ellorin under the more restrictive Title VII case authority. (*See infra* § III.D.) If there is an issue of fact with respect to Mr. Soden’s supervisory capacity under Title VII case authority, then there is also one under WLAD’s more permissive strictures concerning supervisory status. Accordingly, the court denies Mr. Soden’s motion for summary judgment on this issue.

C. Hostile Work Environment under Title VII and WLAD

Claims for gender discrimination based on hostile working environment are recognized under both Title VII and WLAD. *See, e.g., Nichols v. Azteca Restaurant Enter., Inc.*, 256 F.3d 864 (9th Cir. 2001); *Estevez v. Faculty Club of Univ. of Wash.*, 120 P.3d 579, 588 (Wash. Ct. App. 2005). Both Applied Finishing and Mr. Soden assert that they are entitled to summary judgment on Ms. Ellorin’s claims for hostile work environment because, even if taken at face value, Ms. Ellorin’s allegations do not amount

1 to a “severe and pervasive” hostile work environment based on the objective standard of
2 a “reasonable person” in the workplace. (AF Mot. at 5-10; Soden Mot. at 6-11.)

3 To establish a hostile work environment claim based on sexual harassment, Ms.
4 Ellorin must show that she was subjected to verbal or physical conduct of a sexual nature,
5 that was unwelcome, and that was sufficiently severe or pervasive to alter the conditions
6 of her employment and create an abusive working environment. *Westendorf v. W. Coast*
7 *Contractors of Nev., Inc.*, 712 F.3d 417, 421 (9th Cir. 2013). In addition, she must show
8 that a “reasonable person” would find the work environment to be “hostile or abusive”
9 and that she in fact found it so. *Id.* “In analyzing whether the alleged conduct created an
10 objectively hostile work environment, we must assess all the circumstances, including the
11 frequency of the discriminatory conduct; its severity; whether it is physically threatening
12 or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with
13 an employee’s work performance.” *Dominguez–Curry v. Nevada Transp. Dept.*, 424
14 F.3d 1027, 1034 (9th Cir. 2005). In evaluating the conduct at issue, “[t]he required level
15 of severity or seriousness varies inversely with the pervasiveness or frequency of the
16 conduct.” *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1113 (9th Cir. 2004) (citing
17 *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (internal quotation marks omitted)).

18 Courts should bear in mind, however, that “Title VII is not a general civility
19 code.” *E.E.O.C. v. Prospect Airport Services, Inc.*, 621 F.3d 991, 998 (9th Cir. 2010).
20 “A violation is not established merely by evidence showing sporadic use of abusive
21 language, gender-related jokes, and occasional teasing.” *Id.*

1 Although it is not binding, Washington courts look to Title VII case law for
2 instruction or persuasive authority in construing WLAD. *See Glasgow v. Georgia–*
3 *Pacific Corp.*, 693 P.2d 708, 711, n.2 (Wash. 1985); *Valdez–Zontek v. Eastmont Sch.*
4 *Dist.*, 225 P.3d 339, 354 (Wash. Ct. App. 2010). Accordingly, the court’s analysis of
5 federal law applies to Ms. Ellorin’s claim for hostile work environment under WLAD as
6 well. *See Hardage v. CBS Broadcasting Inc.*, 427 F.3d 1177, 1183 (9th Cir. 2005);
7 *Alonso v. Qwest Commc’ns. Co., LLC*, 315 P.3d 610, 616, n.11 (Wash. Ct. App. 2013)
8 (“Because our discrimination laws substantially parallel Title VII of the Civil Rights Act
9 of 1964, we may look to federal law for guidance.”)

10 In asserting that it is entitled to summary judgment on Ms. Ellorin’s hostile work
11 environment claims, Applied Finishing relies primarily on the Washington Court of
12 Appeals decision in *MacDonald v. Korum Ford*, 912 P.2d 1052 (Wash. Ct. App. 1996).
13 (AF Mot. at 6.) In *MacDonald*, the plaintiff complained about the actions of two
14 coworkers. She testified that the first coworker had kissed her once at a New Year’s Eve
15 party, but that beyond this single incident he had never treated her in an inappropriate
16 way. *MacDonald*, 912 P.2d at 1058. The court held that this isolated incident could not
17 support a hostile work environment claim. *Id.*

18 The *MacDonald* plaintiff also testified that a second coworker had a habit of
19 coming up behind her and placing his hand on her back and that he would position
20 himself in the hallway so she would brush against him when she passed. *Id.* Although
21 the plaintiff found the second coworker’s behavior offensive and irritating, she “did not
22 perceive these actions to be sexual harassment at the time they occurred.” *Id.* She also

1 recalled two instances when this coworker used inappropriate language or gestures in her
2 presence, although at least with respect to one of these instances “she was unsure whether
3 [he] meant it to have sexual overtones.” *Id.* Based on this record, the appellate court
4 held that the trial court did not abuse its discretion in concluding that the plaintiff’s
5 lawyer lacked a factual basis for pursuing a hostile work environment claim. *Id.* at 1059.

6 Defendants assert that Ms. Ellorin’s allegations are similarly mild. For example,
7 Mr. Soden allegedly asked Ms. Ellorin out on a date or for drinks and blew her kisses on
8 more than one occasion. (Ellorin Decl. ¶¶ 5-6, 10, 18.) He allegedly told her that she
9 smelled “so good,” would notice what she was wearing, and once blew air on the back of
10 her neck and in her ear while standing close and sniffing her. (*Id.* ¶ 7; Parker Decl. (Dkt.
11 # 36) Ex. D (“Ellorin Dep.”) at 68.) Once, as she left work for the weekend, he allegedly
12 told her not forget to scream his name loudly that night.⁴ (Ellorin Decl. ¶ 12.) The court
13 agrees that these allegations are not as severe as some reported cases in which the
14 plaintiff alleged physical threats or abuse. *See, e.g., EEOC v. National Educ. Ass’n,*
15 *Alaska*, 422 F.3d 840, 843 (9th Cir. 2005) (finding triable issue where supervisor
16 frequently shouted profanities at female employees and touched them in a physically
17 threatening manner); *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002)
18 (finding hostile work environment where employer verbally and physically abused
19 plaintiff because of his race).

20
21 ⁴ As a result of his conduct, Mr. Soden’s presence made it difficult for Ms. Ellorin to
22 concentrate on her work. (Ellorin Decl. ¶ 7.)

1 Nevertheless, the foregoing allegations of misconduct do not present the complete
 2 picture of Ms. Ellorin's allegations. In addition to the foregoing, Ms. Ellorin also testifies
 3 to frequent and pervasive touching by Mr. Soden, and it is this conduct which in part
 4 distinguishes her allegations from the case in *MacDonald*⁵ or other similar claims.⁶ As
 5 noted above, the required severity of the alleged conduct can vary inversely to its
 6 frequency or pervasiveness. *See McGinest*, 360 F.3d at 1113. Thus, the conduct at issue
 7 need not be as severe when frequency or pervasiveness is high. Ms. Ellorin testified that
 8 Mr. Soden provided instructions to her work group "on a daily basis" and that he would
 9 "h[a]ng around [her] work area and . . . find a reason to touch [her]" with the same
 10 frequency—"on a daily basis." (*Id.* ¶¶ 4, 7.) She testified that Mr. Soden would "touch

11
 12
 13 ⁵ In addition to raising doubts about the severity of the alleged harassment, the
 14 *MacDonald* court also cast doubt upon the plaintiff's own subjective experience of the
 15 harassment. A required element of a hostile environment claim is that the work environment be
 16 hostile both objectively and subjectively. *See Westendorf*, 712 F.3d at 421 ("[Plaintiff] had to
 17 present evidence to support a finding that a 'reasonable person' would find her work
 environment to be 'hostile or abusive' and that she in fact did so.") Nevertheless, the
MacDonald plaintiff's own testimony raised doubts about her subjective experience of the work
 environment as hostile. *See MacDonald*, 912 P.2d at 1058 (stating that she "did not perceive
 [the actions at issue] to be sexual harassment at the time they occurred," and that "she was
 unsure whether [her coworker] meant [the conduct at issue] to have sexual overtones"). Here, no
 one has asserted that Ms. Ellorin did not subjectively perceive her work environment as hostile.

18 ⁶ For example, the Ninth Circuit has granted summary judgment on a hostile environment
 19 claim where the harassment was not physical and the plaintiff was subjected to the conduct only
 20 once a week for three months. *See, e.g., Westendorf v. W. Coast Contractors of Nev., Inc.*, 712
 21 F.3d 417, 421-22 (9th Cir. 2013) (concluding that coworker's offensive sexual conduct toward
 22 plaintiff was not sufficiently severe or pervasive where plaintiff only went to coworker's
 workplace once a week for three months and coworker only made offensive sexual remarks on
 about four occasions, harassment was not physical, and plaintiff did not claim her work
 suffered). By way of contrast, Ms. Ellorin testifies that Mr. Soden subjected her to unwanted
 touching on "a daily basis." (Ellorin Decl. ¶ 7.)

1 [her] hand or grab it tightly, rub [her] arms,” stroke her hands or arms, or touch her
 2 shoulder, when he visited her area. (*Id.* ¶¶ 4, 7, 10; Ellorin Dep. at 62:11-63:3, 67:11-24;
 3 Barnes Decl. (Dkt. # 30) Ex. D (“Ellorin Dep.”) at 12:3-18.) She also testified he would
 4 touch or stroke the hands and arms of other female employees as well.⁷ (Ellorin Dep. at
 5 11:15-12:11.) Thus, the fact that some of Mr. Soden’s conduct may not be as severe as
 6 other cases is not dispositive of Ms. Ellorin’s claims on summary judgment due to the
 7 frequency and pervasiveness of his allegedly offensive touching in combination with the
 8 other conduct described above.

9 Applied Finishing and Mr. Soden also argue that they are entitled to summary
 10 judgment on Ms. Ellorin’s hostile work environment claim because, even if Ms. Ellorin
 11 subjectively believes her testimony and was subjectively offended by Mr. Soden’s
 12 conduct, she has failed to establish that her work environment, when viewed by a
 13 “reasonable person” under the totality of the circumstances, was objectively hostile. (AF
 14 Mot. at 9-10; Soden Mot. at 11); *Westendorf*, 712 F.3d at 421. Applied Finishing and Mr.
 15 Soden assert the work environment could not have been “objectively” hostile because

16
 17 ⁷ Defendants also assert that the manner in which Mr. Soden touched Ms. Ellorin was
 18 simply “friendly” (*see* Gillum Decl. ¶ 4; Fisher Decl. ¶ 6) and not sexual or offensive in nature.
 19 However, the court must assess the manner in which he touched her in the context of all the
 20 circumstances, *Dominguez-Curry*, 424 F.3d at 1034 (“In analyzing whether the alleged conduct
 21 created an objectively hostile work environment, [the court] must assess all the
 22 circumstances . . .”), and on summary judgment draw all inferences in Ms. Ellorin’s favor.
 Given her descriptions of Mr. Soden holding her hands “tightly” and “stroking” or rubbing her
 hands and arms, alongside her allegations concerning his other conduct, such as asking her out
 on dates, blowing on her neck and in her ear, blowing her kisses, and implicitly referencing her
 sex life when he told her not to forget to scream his name, the court concludes that a reasonable
 juror could conclude that Mr. Soden touched Ms. Ellorin both objectively and subjectively in a
 sexually offensive manner and not just as a “friendly” gesture.

1 there is “consensus” among the women who have worked with Mr. Soden that, although
2 he is a friendly guy and a “toucher,” he does not behave inappropriately. (AF Mot. at 10;
3 Soden Mot. at 11.)

4 Even assuming that conducting a poll of fellow workers would be the appropriate
5 method for analyzing whether a workplace was “objectively” hostile, the court is
6 unpersuaded by Defendants’ argument. Although some female employees have testified
7 that they never experienced or saw any inappropriate behavior by Mr. Soden (*see* Devi
8 Decl. (Dkt. # 27) ¶¶ 4-7; Porter Decl. (Dkt. # 29) ¶ 5) or that Mr. Soden’s conduct in
9 touching other employees was only “friendly” or “completely innocent”(Gillum Decl.
10 (Dkt. # 25) ¶ 4; Fisher Decl. (Dkt. # 28) ¶¶ 5-6), at least one employee has largely
11 corroborated Ms. Ellorin’s testimony concerning Mr. Soden’s “inappropriate behavior”—
12 including that he blew on female employees’ necks and in their ears, asked female
13 employees out for drinks, touched female employees, whispered in their ears, and slapped
14 at least one female employee on her “rear-end” (*see generally* Smith Decl. (Dkt. # 35)).
15 Thus, even if there is a “consensus” among Applied Finishing’s female employees that
16 Mr. Soden’s behavior was not inappropriate, that “consensus” is certainly not unanimous.
17 The foregoing dispute in testimony creates a factual issue that is not appropriate for
18 resolution on summary judgment and is within the jury’s province. Viewing the evidence
19 in the light most favorable to Ms. Ellorin, the court finds that Applied Finishing and Mr.
20 Soden are not entitled to summary judgment on Ms. Ellorin’s hostile work environment
21 claims under either Title VII or WLAD.

22 //

1 **D. Vicarious Liability under Title VII and WLAD**

2 Applied Finishing argues that the Supreme Court’s recent decision in *Vance v.*
3 *Ball State*, --- U.S. ----, 133 S.Ct. 2434 (2013), controls with respect to whether Mr.
4 Soden’s alleged harassment is imputable to Applied Finishing. (AF Mot. at 10-11.) In
5 *Vance*, the majority held “that an employer may be vicariously liable for an employee’s
6 unlawful harassment only when the employer has empowered that employee to take
7 tangible employment actions against the victim, i.e., to effect a ‘significant change in
8 employment status, such as hiring, firing, failing to promote, reassignment with
9 significantly different responsibilities, or a decision causing a significant change in
10 benefits.’” *Vance*, 133 S.Ct. at 2443 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S.
11 742, 761 (1998)). Based on that holding, Applied Finishing argues that Mr. Soden was
12 not Ms. Ellorin’s supervisor, did not direct any employee’s work, hire or fire anyone,
13 conduct performance evaluations, and did not have the authority to promote, or any other
14 attribute that would make him a supervisor under *Vance*. Thus, Applied Finishing argues
15 that it cannot be held vicariously liable for Mr. Soden’s alleged actions toward Ms.
16 Ellorin. (See AF Mot. at 10-11.)

17 Applied Finishing interprets *Vance* too broadly and the factual record before the
18 court too narrowly. We know from *Vance* that “[t]he ability to direct another employee’s
19 tasks is simply not sufficient” to confer supervisory status. 133 S.Ct. at 2448.
20 “[S]omething more is required in order to warrant vicarious liability.” *Id.* at 2448
21 (internal quotations omitted). Although the Supreme Court rejected a “more open-ended
22 approach . . . which ties supervisor status to the ability to exercise significant direction

1 over another's daily work," *id.* at 2443, it nevertheless recognized that supervisor status is
2 not conferred solely by formal designations but also where an alleged harasser has been
3 empowered "to make tangible employment decisions" or "take tangible employment
4 actions" against the victim, *id.*; *see id.* at 2448 ("[T]he authority to take tangible
5 employment actions is the defining characteristic of a supervisor . . .").

6 This point was emphasized by the *Vance* majority when it confirmed that the
7 alleged harassers in an earlier Supreme Court case, *Faragher v. City of Boca Raton*, 524
8 U.S. 775 (1998), were "supervisors" under Title VII even though they held the same
9 position as the plaintiff. *See Vance*, 133 S.Ct. at 2446-47, 2446 n.8. According to the
10 *Vance* majority, the individual defendants in *Faragher* were "supervisors" because their
11 recommendations with respect to hiring, supervision, and discipline were in practice
12 often followed. *See id.* Indeed, the Supreme Court made clear that "tangible
13 employment actions can be subject to . . . approval" by higher management. *Id.* at 2447
14 n.8.

15 The *Vance* Court further recognized that where an employer "attempt[s] to confine
16 decisionmaking power to a small number of individuals, those individuals will have a
17 limited ability to exercise independent discretion when making decisions and will likely
18 rely on other workers who actually interact with the affected employee." *Id.* at 2452.
19 Thus, even where an alleged harasser does not have power to take formal actions vis-à-
20 vis the victim, the alleged harasser may have substantial input into those decisions, if he
21 or she is more familiar with the victim's work than the off-site manager with actual direct
22 authority to take the formal action. *Id.* (citing *Rhodes v. Ill. Dep't of Transp.*, 359 F.3d

1 498, 509 (7th Cir. 2004)). “Under those circumstances, the employer may be held to
2 have effectively delegated the power to take tangible employment actions to the
3 employees on whose recommendation it relies.” *Vance*, 133 S.Ct. at 2452.

4 When applied to this case, the reasoning of the *Vance* decision renders summary
5 judgment inappropriate because questions of fact remain about Mr. Soden’s supervisory
6 status. Ms. Ellorin has testified that Mr. Soden provided direction or instruction to the
7 production team on a daily basis. (Ellorin Decl. ¶ 4.) Based on the *Vance* decision, we
8 know that providing direction to other employees alone is not enough to confer
9 supervisory status. *Id.* at 2448. To make out a claim for vicarious liability, Ms. Ellorin
10 must demonstrate that Mr. Soden could play a significant, possibly determinative role, in
11 such matters as “hiring, firing, failing to promote, [or] reassignment with significantly
12 different responsibilities.” *Id.* at 2443. Although both Mr. Soden and Mr. Bickle have
13 testified that Mr. Soden played no role in hiring, firing or supervising employees, the
14 record is not unwavering in this respect. (Soden Dep at 23:23-24:9; Bickle Dep. at
15 12:23-24.) Mr. Alligood has testified that Mr. Soden has played a role in hiring
16 employees at the company and that he could make recommendations concerning
17 termination. (Alligood Dep. at 6:3-4; 5:18-6:2; 6:5-10:9.) In addition, Ms. Ellorin
18 testifies that it was Mr. Soden who announced to her team that she was going to be
19 promoted to the quality assurance position and begin training in that position. (Ellorin
20 Decl. ¶ 14.) The fact that Mr. Soden was designated a manager (Bickle Dep. at 12:10-14;
21 Soden Dep. at 23:19-20), who, at least at times, and perhaps “on a daily basis,” directed
22 Ms. Ellorin’s work (Ellorin Decl. ¶ 4), and (as one owner of the company has testified)

1 played a role in hiring and could make recommendations concerning termination
 2 (Alligood Dep. at 5:18-10:9), makes it reasonable to infer that Mr. Soden would have had
 3 a significant role in Ms. Ellorin's performance reviews and eligibility for promotion to
 4 the quality assurance position. Based on this evidence, the court concludes that Applied
 5 Finishing is not entitled to summary judgment on this issue, but rather that it is properly
 6 reserved for the jury.⁸

7 **E. Negligence under Title VII and WLAD**

8 Applied Finishing asserts that it is entitled to summary judgment with respect to
 9 its own negligence under Title VII and the WLAD. (AF Mot. at 11-13.) "[W]here
 10 harassment by a co-worker [as opposed to a supervisor or manager] is alleged, the
 11 employer can be held liable only where 'its own negligence is a cause of the
 12 harassment.'" *Swenson v. Potter*, 271 F.3d 1184, 1191 (9th Cir. 2001) (citing *Ellerth*,
 13 524 U.S. at 759). "Title VII liability is direct, not derivative: An employer is responsible
 14 for its own actions or omissions, not for the coworker's harassing conduct." *Swenson*,
 15 271 F.3d at 1191-92. Where one coworker allegedly harasses another coworker, the
 16 employer may be liable if it knows or should know of the harassment but fails to take
 17 steps "reasonably calculated to end the harassment." *Dawson v. Entek Int'l*, 630 F.3d
 18 928, 938 (9th Cir. 2011); *see also* 29 C.F.R. § 1604.11(d) ("With respect to conduct

20 ⁸ The court is mindful of the *Vance* majority's observation that the "the question of
 21 supervisor status, when contested, can very often be resolved as a matter of law before trial."
 22 *Vance*, 133 S.Ct. at 2450. Nevertheless, where as here "there are genuine factual disputes about
 an alleged harasser's authority to take tangible employment actions," "the issue of supervisor
 status cannot be eliminated from the trial." *Id.*

1 between fellow employees, an employer is responsible for acts of sexual harassment in
2 the workplace where the employer (or its agents or supervisory employees) knows or
3 should have known of the conduct, unless it can show that it took immediate and
4 appropriate corrective action.”).

5 Applied Finishing asserts that if Mr. Soden was not Ms. Ellorin’s “supervisor” for
6 Title VII purposes, then it is entitled to summary judgment with respect to its own
7 negligence on grounds that it was not on notice of Mr. Soden’s behavior until the initial
8 conversation between Ms. Ellorin’s husband and Mr. Bickle, and that once the company
9 was on notice, it took reasonable measures to investigate and prevent any further
10 harassment to Ms. Ellorin. (AF Mot. at 11-13.) Once again, the court cannot conclude
11 that Applied Finishing is entitled to summary judgment. First, as detailed above and
12 contrary to Applied Finishing assertions, there is evidence that Ms. Ellorin’s “lead” was
13 aware of at least some of Mr. Soden’s objectionable conduct prior to Mr. Lee’s telephone
14 conversation with Mr. Bickle. (*See* Ellorin Decl. ¶ 12.) Second, there is also evidence
15 from which a reasonable juror could conclude that the measures Applied Finishing took
16 after Mr. Lee’s telephone call were not reasonably sufficient to stop the alleged
17 harassment. After all, Ms. Ellorin testified that Mr. Soden blew her a kiss just outside of
18 Mr. Alligood’s office the morning after Mr. Lee first telephoned Mr. Bickle concerning
19 Mr. Soden’s objectionable conduct. (*See* Ellorin Decl. ¶ 18.) In addition, she also
20 subsequently heard Mr. Soden asking another female employee out on a date. (*See id.*
21 ¶ 21.) Further, there is no evidence that the company considered any step to stop the
22 harassment other than counseling Mr. Soden concerning his behavior and the type of

1 conduct the company expected. Although a reasonable juror could conclude that the
2 company's response was adequate and reasonably executed under the circumstances of
3 this case, such a juror would not be compelled to so conclude. Accordingly, the court
4 denies summary judgment on this issue.

5 **F. Quid Pro Quo Liability**

6 To prove actionable harassment under a quid pro quo or "tangible employment
7 action" theory under Title VII, Ms. Ellorin must show that Mr. Soden "explicitly or
8 implicitly conditioned her job, a job benefit, or absence of detriment on her acceptance of
9 sexual conduct." *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1054 (9th Cir. 2007).
10 WLAD imposes similar requirements with respect to a quid pro quo claim. *See*
11 *Thompson v. Berta Enterprises, Inc.*, 864 P.2d 983, 986-87 (Wash. Ct. App. 1994) ("In
12 order to establish quid pro quo harassment under RCW 49.60 an employee must prove
13 (1) she belongs to a protected group, (2) she was subject to unwelcome sexual
14 harassment, (3) the harassment was based on gender and (4) her reaction to the
15 harassment complained of affected tangible aspects of the employee's compensation,
16 terms or conditions of employment."); *see also Pacific Intern'l Grout Co. v. Zinkova*, No.
17 2:12-cv-00778-MJP, 2012 WL 3051771, at *4 (W.D. Wash. July 25, 2012). Applied
18 Finishing and Mr. Soden assert that there is no evidence that Mr. Soden explicitly or
19 implicitly conditioned Ms. Ellorin's placement in the quality assurance position on her
20 acceptance of his unwelcome conduct. (AF Mot. at 14; Soden Mot. at 12-13.) With
21 respect to this claim, the court agrees.
22

1 Without some evidence of a causal connection between Mr. Soden's alleged
2 conduct and Ms. Ellorin's alleged job detriment in failing to attain the quality assurance
3 position or being laid off, her quid pro quo harassment claim cannot survive summary
4 judgment. *See Copantitla v. Fiskardo Estiatorio, Inc.*, 788 F. Supp. 2d 253, 298
5 (S.D.N.Y. 2011). There is no testimony or other evidence before the court that Mr.
6 Soden ever explicitly demanded that Ms. Soden submit to his allegedly offensive
7 conduct. Indeed, Ms. Ellorin herself agreed that Mr. Soden never explicitly told her that
8 she would get her promotion if she agreed to go on a date with him (Ellorin Dep at 67:25-
9 68:4), and she also agreed that he never explicitly told her she would get better benefits
10 or promotions if she agreed to have sexual relations with him (*id.* at 76:15-23).

11 The only evidence of an implicit demand is Ms. Ellorin's testimony that she
12 spurned Mr. Soden's advances and subsequently a male coworker was placed in the
13 quality assurance position and she was laid off. The mere chronological juxtaposition of
14 these events alone, however, is insufficient to raise a genuine issue of fact concerning
15 causation. *See, e.g., Dochniak v. Dominion Mgmt. Servs., Inc.*, No. 06-237 (JRT/FLN),
16 2007 WL 2669443, at *3 (D. Minn. Sept. 6, 2007) ("The mere timing of [plaintiff's]
17 demotion, one day after refusing [assistant manager's] sexual advances, is not sufficient
18 by itself to support an inference that her refusal was connected to the demotion.").

19 Although the Ninth Circuit has held that causation may be inferred based on temporal
20 proximity alone in the context of a retaliation claims, *see, e.g., Ray v. Henderson*, 217

1 F.3d 1234, 1244 (9th Cir. 2000), the court finds no instance where the Ninth Circuit has
 2 extended this rule to quid pro quo harassment claims.⁹

3 Even if, however, the court could consider temporal proximity alone to infer
 4 causation, Ms. Ellorin's evidence would be insufficient to survive Defendants' motion for
 5 summary judgment. Where a plaintiff relies on evidence of temporal proximity, the case
 6 law "uniformly hold[s]" that the temporal link "must be very close." *Clark Cnty. Sch.*
 7 *Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001). Ms. Ellorin testifies that Mr. Soden
 8 "stopped his advances" after August 20, 2012. (*See* Ellorin Decl. ¶ 22.) She was not laid
 9 off until May 3, 2013. (*Id.* ¶ 24.) The more than eight month gap between Mr. Soden's
 10 allegedly offending conduct and Ms. Ellorin's termination is too remote to infer causality
 11 between the two. *See Breeden*, 532 U.S. at 273-74 (citing case law concerning causal
 12 connection requirement in context of a retaliation case indicating that a three or four
 13 month gap is insufficient).

14 With respect to Ms. Ellorin's failure to attain the quality assurance position, none
 15 of the evidence before the court grounds Ms. Ellorin's failure to attain the position or Mr.

17 ⁹ The court notes, however, that other circuit courts have considered temporal proximity
 18 along with other evidence in deciding causation in the context of quid pro quo claims. *See, e.g.,*
 19 *Frenley v. N. Miss. Medical Center, Inc.*, 440 Fed. App'x 383, 387 (5th Cir. 2011) ("We agree
 20 with our sister circuits that temporal proximity evidence can be considered along with other
 21 circumstances in deciding causation.") (citing *Papelino v. Albany Coll. of Pharmacy of Union*
 22 *Univ.*, 633 F.3d 81, 89 (2d Cir. 2011) (finding a genuine fact issue as to causation based on close
 temporal proximity and other evidence in a quid pro quo case); *Cotton v. Cracker Barrel Old*
Country Store, Inc., 434 F.3d 1227, 1232 (11th Cir. 2006) (stating in dicta that "temporal
 proximity between harassment and a tangible employment action can give rise to a genuine issue
 of fact as to causation . . ."); *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 285 (3d Cir.
 2000) (using temporal proximity evidence in evaluating the causal nexus at the summary
 judgment phase in a quid pro quo case)).

1 Martinez's installation in the position to a specific time or period of time. (*See* Ellorin
2 Decl. ¶ 23 ("I was never given the Quality Assurance position Another employee,
3 Antonio Martinez, was transferred to Quality assurance; and he took the position I was
4 promised before I complained."). As a result, the court can draw no reasonable inference
5 as to the temporal proximity between the allegedly harassing conduct and her failure to
6 be promoted. *See, e.g., Copantitla v. Fiskardo Estiatorio, Inc.*, 788 F. Supp. 2d 253, 289-
7 99 (S.D.N.Y. 2011) ("[Plaintiff's] testimony does not ground any of [Defendant's]
8 allegedly harassing behavior in a specific time period, so the Court can draw no
9 reasonable inference as to the temporal proximity of that behavior to [Plaintiff's] alleged
10 firing."). Accordingly, this evidence is also insufficient to infer causation or avoid
11 summary judgment.

12 More importantly, however, Ms. Ellorin's own testimony negates any claim that
13 Mr. Soden was implicitly conditioning her promotion on her acquiescence to his conduct.
14 In response to a question concerning whether Mr. Soden had conditioned job benefits or
15 promotions on her acquiescence to his demands, she replied: "No. He didn't say that, and
16 I knew that I was qualified, and that I could earn those promotions anyway on my own."
17 (*Id.* at 76:23-25.) Thus, Ms. Ellorin indicates that she believed that she was capable of
18 attaining promotions at Applied Finishing irrespective of Mr. Soden's behavior. In light
19 of this testimony, the court agrees that Applied Finishing and Mr. Soden are entitled to
20 summary judgment on Ms. Ellorin's claim for quid pro quo harassment. There is simply
21 no evidence upon which a reasonable juror could conclude that Mr. Soden either
22 explicitly or implicitly conditioned a job benefit or the absence of a job detriment on her

1 submission to his behavior or demands. Without some evidence of a causal connection
2 between the alleged sexual harassment and the adverse employment actions she alleges,
3 the court must dismiss Ms. Ellorin's quid pro quo sexual harassment claim. The court,
4 therefore, grants Defendants' motions for summary judgment with respect to this claim.

5 **G. Applied Finishing' Affirmative Defense to Vicarious Liability**

6 If a supervisor has sexually harassed an employee, the employer can assert an
7 affirmative defense and avoid liability if it can show that: (1) it took no tangible
8 employment action against the employee; (2) it exercised reasonable care to prevent and
9 correct the harassment; and (3) the employee unreasonably failed to take advantage of
10 preventive or corrective opportunities. *Hardage v. CBS Broadcasting, Inc.*, 427 F.3d
11 1177, 1183-84 (9th Cir. 2005).

12 Applied Finishing asserts that it is entitled to summary judgment on this
13 affirmative defense. (AF Mot. at 15-16.) Even assuming that Applied Finishing took no
14 tangible employment action against Ms. Ellorin, it is not entitled to summary judgment
15 on this issue. Applied Finishing asserts that it is entitled to summary judgment because
16 Ms. Ellorin admits that she did not personally complain to Randy or Pam Bickle or Mike
17 Alligood, or even to her lead, Michell Gillum. (*See id.* at 15 (citing Ellorin Dep. at
18 79:16-80:19).) Ms. Ellorin's husband, however, did initially notify the company on her
19 behalf on May 14, 2012—approximately five months after the conduct at issue started.
20 (*See* Ellorin Decl. ¶¶ 17; *see also id.* ¶¶ 2, 4 (indicating that Ms. Ellorin became a full-
21 time direct employee of the company on January 22, 2012, and “immediately noticed
22 [Mr.] Soden behaving inappropriately towards some female employees . . .”).) Further,

1 Ms. Ellorin has testified that even if she did not report the harassment to Ms. Gillum, Ms.
 2 Gillum observed it herself.¹⁰ (*See, e.g.*, Ellorin Dep. at 80:1-5 (“Q: [D]id you ever
 3 initiate a conversation with Michelle Gillum about your complaints? . . . A: No. It was
 4 Michelle herself who saw it, and that’s where it all started.”); *see also* Ellorin Decl. ¶ 18.)
 5 In any event, the fact that she reported the problem through an intermediary (her
 6 husband) rather than personally does not entitle Applied Finishing to summary judgment
 7 on the affirmative defense. *See, e.g., Erickson v. Daimler Trucks N. Am., LLC*, No. CV-
 8 10-0132-ST, 2011 WL 4753534, at *11 (D. Or. July 20, 2011) (“Even if a plaintiff does
 9 not follow reporting requirements of the company’s anti-harassment policy, the employer
 10 may still be on notice.”) (citing *Nichols v. Azteca Restaurant Enters.*, 256 F3d 864, 870-
 11 71 (9th Cir. 2001)).

12 Once Applied Finishing was on notice of the alleged harassment (which there is
 13 no dispute occurred at least as of the day Mr. Lee spoke with Mr. Bickle on the
 14 telephone), it was required to exercise reasonable care to correct the alleged harassment.
 15 *See Kohler*, 244 F.3d at 1181 (“The [reasonable care] prong of the affirmative defense
 16 also requires [the employer] to demonstrate that it exercised reasonable care to promptly
 17 correct sexually harassing behavior.”). The Ninth Circuit has held that an employer’s
 18 adoption of an anti-harassment “policy and its efforts to disseminate the policy to its
 19 employees establish that [the employer] exercised reasonable care to prevent sexual
 20 harassment in the workplace.” *Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1180 (9th Cir.

21
 22 ¹⁰ Ms. Gillum denies having seen any harassment during her time at Applied Finishing
 (Gillum Decl. ¶ 12), but this testimony simply creates a fact issue for trial.

2001) *see also Ellerth*, 524 U.S. at 765. Although Applied Finishing has a policy prohibiting sexual harassment in its employee handbook (Bickle Dep. at 10:5-22), there is no evidence that the employee handbook was in place at the time Ms. Ellorin started working at Applied Finishing or that she ever received a copy (Alligood Dep. at 22:16-23:2). Further, although testimony indicates that the employee handbook was in place before Mr. Soden came to work for the company (Bickle Dep. at 10:5-14), Mr. Bickle does not recall if he reviewed the company's sexual harassment policy with Mr. Soden, told him what it was, or even gave him a copy of it during their counseling session concerning Ms. Ellorin's complaints. (*Id.* at 34:13-25, 35:5-10.) Indeed, Mr. Bickle has no specific recollection of ever giving Mr. Soden a copy of the company's policy. (*Id.* at 35:11-14.) More importantly, Mr. Soden has acknowledged that although there was a copy of the employee handbook available in the office when he started at the company, he never reviewed it with anyone, including Mr. Bickle or Mr. Alligood. (Soden Dep. at 49:7-50:7.) Finally, after Mr. Bickle's initial counseling session with Mr. Soden, Ms. Ellorin has testified that episodes of the conduct at issue continued. (Ellorin Decl. ¶¶ 18-21.) Thus, although Applied Finishing may ultimately be able to establish its affirmative defense at trial, on the record before the court, it is not entitled to summary judgment.

H. Retaliation under Title VII and WLAD

To prevail on her retaliation claim, Ms. Ellorin must show: (1) that she engaged in a protected activity; (2) that she suffered an adverse employment action; and (3) that there is a causal connection between the protected activity and the adverse employment

1 action. *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 965 (9th Cir. 2004). The
 2 showings required for a retaliation claim under both Title VII and the WLAD are
 3 identical, except for the causation element. Under Title VII, Ms. Ellorin must prove that
 4 her protected activity was the “but-for” cause of the adverse employment action, while
 5 under the WLAD she must merely demonstrate that the protected activity was a
 6 “substantial factor” in the employer’s decision to take the adverse employment action.
 7 *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, --- U.S. ---, 133 S.Ct. 2517, 2521 (2013) (holding
 8 that “Title VII retaliation claims require proof that the [employer’s] desire to retaliate was
 9 the but-for cause of the challenged employment action”); ¹¹ *Allison v. Hous. Auth. of City*
 10 *of Seattle*, 821 P.2d 34, 42-43 (Wash. 1991) (rejecting “but-for” standard of causation in
 11 favor of more lenient “substantial factor” standard). Once Ms. Ellorin has made out a
 12 prima facie case, the burden of production then shifts to Defendants to advance
 13 legitimate, nonretaliatory reasons for any adverse actions taken against Ms. Ellorin, then
 14 she has the ultimate burden of showing that employer’s proffered reasons are pretextual.
 15 *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994).

16 Both Applied Finishing and Mr. Soden argue that the court should dismiss Ms.
 17 Ellorin’s claims for retaliation because she has failed to demonstrate the third element of

18
 19 ¹¹ *Nassar* created a new burden on plaintiffs to show but-for causation in Title VII
 20 retaliation claims. 133 S.Ct. at 2534. For claims of status-based discrimination (race, color,
 21 national origin, sex, religion), a plaintiff need only show that “the motive to discriminate was one
 22 of the employer’s motives, even if the employer also had other, lawful motives.” *Id.* at 2523. For
 claims of retaliation, on the other hand, a plaintiff must meet a higher standard: “Title VII
 retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged
 employment action.” *Id.* at 2528.

her prima facie case—a causal connection between her or her husband’s complaints about Mr. Soden’s alleged harassment and her failure to obtain the quality control position or being laid off.¹² (AF Mot. at 18-20; Soden Mot. at 14.) The court concludes that Ms. Ellorin has failed to raise a genuine issue of material fact regarding this element. Ms. Ellorin provides no direct evidence of but-for causation, and instead asks the court to infer causation from the chain of events. Specifically, following her husband’s complaints to Mr. Bickle on May 14, 2012, and August 20, 2012, Ms. Ellorin states that she “was never given the Quality Assurance position that [she] had been promised” and instead “[a]nother employee, Antonio Martinez, was transferred to Quality Assurance” and “took the position [she] was promised before [she] complained.” (Ellorin Decl. ¶ 23.) In addition, she states that on May 3, 2013, she was laid off while Mr. Martinez continued to work in the Quality Assurance position. (*Id.* ¶ 24.)

The Ninth Circuit has held that causation “may be inferred from circumstantial evidence, such as the employer’s knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly

¹² Neither Applied Finishing nor Mr. Soden challenged the first element of Ms. Ellorin’s retaliation claim on summary judgment. With respect to the second element, both argued that due to cutbacks in the company’s workforce no quality control position was ever created. (Bickle Decl. ¶ 2; *see also* 9/5/13 Alligood Decl. (Dkt. # 42) ¶¶2-3.) Ms. Ellorin, however, testified that the position was not only created, but in fact filled by Antonio Martinez, a male coworker (Ellorin Decl. ¶¶ 23-24). Viewing these facts in the light most favorable to Ms. Ellorin, a reasonable juror could believe her testimony and conclude that the position had been created and that one of Ms. Ellorin’s male coworkers had been installed in it rather than her. However, in light of the court’s ruling that Ms. Ellorin fails to raise a genuine issue of fact with respect to the causation element of her prima facie retaliation claim, Defendants are still entitled to summary judgment on this claim.

retaliatory employment decision.” *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987); *Ray v. Henderson*, 217 F.3d 1234, 1244 (9th Cir. 2000) (“That an employer’s actions were caused by an employee’s engagement in protected activities may be inferred from proximity in time between the protected action and the allegedly retaliatory employment decision.”) (internal quotations omitted).¹³ The Supreme Court, however, has clarified that for a plaintiff to establish causation in prima facie case of retaliation only on the basis of “temporal proximity between an employer’s knowledge of protected activity and an adverse employment action, . . . the temporal proximity must be very close.” *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (per curiam) (citing cases from circuit courts holding that a three-month or four-month time lapse is insufficient to infer causation).

Here, Ms. Ellorin’s evidence with respect to temporal proximity is simply insufficient to establish a prima facie case of retaliation, let alone that Applied Finishing’s proffered explanation is pretextual. Undisputed evidence establishes that there was a gap of approximately eight months between Mr. Lee’s second conversation with Mr. Bickle concerning Mr. Soden’s conduct and the date that Ms. Ellorin was laid off. (See Ellorin Decl. ¶¶ 22, 24.) As discussed above, this length of time is simply insufficient to establish causation for a retaliation claim based on the temporal proximity

¹³ An employer’s awareness of the protected activity is required to supply evidence of a causal link between the protected activity and the adverse action. *See Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982). There is no dispute with respect to Applied Finishing knowledge of Mr. Lee’s conversations with Mr. Bickle on Ms. Ellorin’s behalf concerning Mr. Soden’s allegedly harassing behavior.

alone. *See Breeden*, 532 U.S. at 273. With respect to Ms. Ellorin's claim that, prior to her termination, a male employee was promoted to the quality assurance position instead of her, she has not presented the court with specific information concerning when this event occurred. It apparently happened at some point after Mr. Lee's second conversation with Mr. Bickle (August 20, 2012) and before her termination (May 3, 2013), but there is no indication of precisely when Mr. Martinez assumed the quality assurance position. (*See id.* ¶¶ 22-24.) Absent any evidence that his promotion occurred "very close" to Mr. Lee's second conversation with Mr. Bickle, *see Breeden*, 532 U.S. at 273, the court concludes that Applied Finishing and Mr. Soden are entitled to summary judgment on this claim. Ms. Ellorin has simply presented insufficient evidence of causation to raise a genuine issue of material fact with respect to her prima facie case of retaliation.¹⁴

I. Differential Treatment under Title VII and WLAD

Ms. Ellorin's claims that Defendants subjected her to differential treatment because of her sex in violation of Title VII and WLAD. (Compl. ¶¶ 46-50, 92-96). Defendants move to dismiss these claims for failure to properly plead or on summary judgment. (AF Mot. at 17; Soden Mot. at 13.)

¹⁴ At least one district court within the Ninth Circuit has concluded that following the Supreme Court's decision in *Nassar* evidence of knowledge and proximity in time alone is insufficient to create a disputed issue of fact on causation with respect to a retaliation claim. *See Drott v. Park Electrochemical Corp.*, No. CV 11-1596-PHX-JAT, 2013 WL 6157858, at *14-*16 (D. Ariz. Nov. 25, 2013). This court need not decide this issue because, as discussed above, even assuming that evidence of close temporal proximity remains sufficient in some circumstances to raise a genuine issue of fact on causation for a retaliation claim, Ms. Ellorin fails to provide such evidence here.

1 Title VII and WLAD claims for disparate treatment are both considered under the
2 burden shifting analysis established by the Supreme Court. *See McDonnell Douglas*
3 *Corp. v. Green*, 411 U.S. 792, 802-805 (1973); *see also Domingo v. Boeing Employees’*
4 *Credit Union*, 98 P.3d 1222, 1225 (Wash. Ct. App. 2004). Under the *McDonnell*
5 *Douglas* framework, the plaintiff first must establish a prima facie case of discrimination.
6 *Chuang v. University of Cal. Davis*, 225 F.3d 1115, 1123 (9th Cir. 2000). Specifically,
7 plaintiff must show that he or she (1) belongs to the protected class; (2) was qualified for
8 the position; (3) was subject to an adverse employment action; and (4) similarly situated
9 employees outside the protected class were treated more favorably. *Id.* Next, the burden
10 of production shifts to the defendant to articulate a legitimate nondiscriminatory reason
11 for its decision. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994). Finally, the
12 burden shifts back to the plaintiff to demonstrate that the reason offered by the defendant
13 is a pretext for an underlying discriminatory motive. *Chuang*, 225 F.3d at 1123. The
14 plaintiff must show that the articulated reason is pretextual “either directly by persuading
15 the court that a discriminatory reason more likely motivated the employer or indirectly by
16 showing that the employer’s proffered explanation is unworthy of credence.” *Texas*
17 *Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

18 Although, as a general matter, the plaintiff in an employment discrimination action
19 need produce very little evidence in order to overcome an employer’s motion for
20 summary judgment, *Chuang*, 225 F.3d at 1124, Ms. Ellorin has failed to meet even this
21 low bar with respect to her differential treatment claims. When asked about the claims
22 during her deposition, Ms. Ellorin’s attorney objected stating that she could not answer

1 without “the assistance of counsel,” and Ms. Ellorin was unable to provide any factual
2 details:

3 Q: [Your complaint] says that Mike Soden discriminated against you by
4 subjecting you to differential treatment because of your sex. What that says
5 to me is that he favored males over you because you’re a female. Am I
6 misinterpreting what you mean?

7 Mr. Parker: I object to the question, because it can’t be answered
8 without the assistance of counsel.

9 Mr. Barnes: Oh I see, because it’s a matter of legal analysis?

10 Mr. Parker: Correct.

11 By Mr. Barnes:

12 Q: You’ve heard the objection. The question is are you able to answer this
13 without invoking legal doctrine that your lawyer would know about?

14 A: No.

15 (Ellorin Dep. 77:22-78:12.)

16 Despite the objection that questions concerning Ms. Ellorin’s differential treatment
17 claims were “a matter of legal analysis,” Ms. Ellorin’s attorney never discussed the claim
18 in either of the responsive memoranda he drafted to Defendants’ motions for summary
19 judgment. (*See generally* Resp. to AF Mot. (Dkt. # 33); Resp. to Soden Mot. (Dkt. #
20 38).) “A party opposing a properly supported motion for summary judgment may not
21 rest upon the mere allegations or denials in pleadings, but ‘must set forth specific facts
22 showing that there is a genuine issue for trial.’” *MAI Sys. Corp. v. Peak Computer, Inc.*,
991 F.2d 511, 518 (9th Cir.1993) (citation omitted). Neither Ms. Ellorin nor her counsel
have done anything to flesh out her differential treatment claim, explain how the facts she

1 alleges conform to the elements of the claim, or explain how her differential treatment
2 claims under Title VII and WLAD are different from her hostile work environment or
3 quid pro quo claims. Based on the foregoing, the court finds that Ms. Ellorin has for all
4 intents and purposes abandoned her claims for differential treatment and Defendants are
5 entitled to dismissal.

6 Further, Ms. Ellorin's differential treatment claims fair no better based on the
7 court's own review of the factual record. An adverse employment action upon which a
8 differential treatment claim may be based includes a significant change in employment
9 status, such as "hiring, firing, failing to promote, reassignment with significantly different
10 responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S.
11 at 761. "A tangible employment action in most cases inflicts direct economic harm." *Id.*
12 at 762; *see also Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1113 (9th Cir. 2000) (no
13 adverse employment action where the plaintiff "was not demoted, was not stripped of
14 work responsibilities, was not handed different or more burdensome work
15 responsibilities, was not fired or suspended, was not denied any raises, and was not
16 reduced in salary or in any other benefit."). The only actions in the record that might
17 support this element of the claims include Applied Finishing's failure to place Ms. Ellorin
18 in the quality assurance position and its subsequent decision to terminate her job.

19 Applied Finishing, however, has countered with legitimate nondiscriminatory
20 reasons for these decisions—namely that the position itself, although discussed, was
21 never created or filled, and Ms. Ellorin was laid off as part of a general downsizing due to
22 poor economic conditions. (*See* R. Bickle Decl. ¶ 2; Bickle Dep. at 47:12-48:5.) Indeed,

1 Mr. Martinez, the male coworker that Ms. Ellorin testifies was placed in the Quality
2 Assurance position instead of her, was also subsequently laid off. (12/5/13 Alligood
3 Decl. (Dkt. # 42) ¶ 4.)

4 The only evidence that Ms. Ellorin can point to as demonstrating that Applied
5 Finishing's proffered explanation is pretextual is Mr. Soden's earlier objectionable
6 conduct. As discussed above, however, the court has already found that Ms. Ellorin has
7 failed to establish that Mr. Soden's conduct is sufficiently close in time to Applied
8 Finishing's alleged promotion of Mr. Martinez or Ms. Ellorin's termination to provide a
9 causal link between the company's actions and Mr. Soden's conduct. (*See supra* § III.H.)
10 For the same reasons, the court finds that Ms. Ellorin fails to raise a material issue of fact
11 that a discriminatory reason more likely motivated Applied Finishing or that its proffered
12 explanation concerning her termination or failure to attain the quality assurance position
13 is unworthy of credence.

14 **J. State Law Tort Claims Duplicative of Title VII and WLAD Claims**

15 Defendants move for summary judgment of Ms. Ellorin's state law claims arguing
16 that such claims must be dismissed under Washington law as duplicative of her WLAD
17 claims. (AF Mot. at 18; Soden Mot. at 15.) Washington courts have held that common
18 law tort claims, such as negligent infliction of emotional distress, negligent supervision,
19 and intentional infliction of emotional distress (which is also known as the tort of
20 outrage), that are based on the same facts underpinning a plaintiff's claim for unlawful
21 discrimination, are duplicative of the discrimination claim and therefore must be
22 dismissed. *See Francom v. Costco Wholesale Corp.*, 991 P.2d 1182, 1192-93 (Wash. Ct.

App. 2000) (trial court properly dismissed claims for negligent infliction of emotional distress and negligent supervision or retention where those claims relied on the same underlying facts supporting plaintiffs' discrimination claim); *Haury v. Snow*, 31 P.3d 1186, 1193 (Wash. Ct. App. 2001) (ruling that an employee may recover damages for emotional distress in an employment context but only if the factual basis for the claim is distinct from the factual basis for the discrimination claim); *see also Anaya v. Graham*, 950 P.2d 16, 20 (Wash. Ct. App. 1998) (affirming trial court's dismissal of claim of outrage because it "duplicates the discrimination claim"). Such claims can "only arise[] when the claim is based on a separate factual basis from the sexual discrimination claim." *Haury*, 31 P.3d at 1193. There is no dispute that the same factual allegations that underpin Ms. Ellorin's WLAD claims also underpin her state law claims. (*See generally* Compl.) Accordingly, the court grants Defendants' motion for summary judgment with respect to Ms. Ellorin's claims for sexual battery (*id.* ¶¶ 56-62), intentional infliction of emotional distress (*id.* ¶¶ 63-67), negligent infliction of emotional distress (*id.* ¶¶ 68-72), and negligent hiring and supervision (*id.* ¶¶ 73-77).¹⁵

//

//

//

¹⁵ Because the court dismisses these claims as duplicative under Washington law, there is no need for the court to consider Defendants' motions for summary judgment based on the substance of these claims or Applied Finishing motion for summary judgment based on the absence of grounds to impose respondeat superior. (*See* Soden Mot. at 3-5; AF Mot. at 16-17, 20.)

1 K. Punitive Damages

2 Defendants move for summary judgment with respect to any award of punitive
 3 damages under WLAD.¹⁶ (AF Mot. at 21; Soden Mot. at 15.) In Washington, such
 4 damages are contrary to public policy and not available under WLAD. *Dailey v. N.*
 5 *Coast Life Ins. Co.*, 919 P.2d 589, 590-91 (Wash. 1996). Accordingly, the court grants
 6 Defendants' motion for summary judgment on this issue.

7 Applied Finishing also moves for summary judgment with respect to any award of
 8 punitive damages under Title VII. (AF Mot. at 21-22.) The availability of punitive
 9 damages in a Title VII case is governed by statute. Section 1981a(b)(1) of Title 42
 10 provides:

11 A complaining party may recover punitive damages under [Title VII]
 12 against a respondent (other than a government, government agency or
 13 political subdivision) if the complaining party demonstrates that the
 14 respondent engaged in a discriminatory practice or discriminatory practices
 15 with malice or with reckless indifference to the federally protected rights of
 16 an aggrieved individual.

17 42 U.S.C. § 1981a(b)(1). In *Kolstad v. American Dental Association*, 527 U.S. 526
 18 (1999), the Supreme Court concluded a defendant is appropriately subject to punitive
 19 damages if it acts "in the face of a perceived risk that its actions will violate federal law."
 20 *Id.* at 536. Punitive damages "apply in intentional discrimination cases where the
 21 plaintiff can show that the employer knowingly or recklessly acted in violation of federal
 22 law." *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1197 (9th Cir. 2002) (citing *Kolstad*,

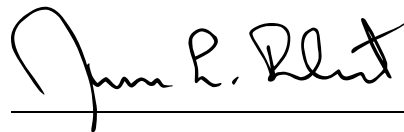
21 ¹⁶ The court need not consider whether punitive damages would be available under any of
 22 Ms. Ellorin's other state claims because the court has dismissed these claims on summary
 judgment. (*See supra* § III.J.)

527 U.S. at 535). Even if the plaintiff makes this showing, the employer may nonetheless “escape punitive damages if it can show that the challenged actions were not taken by senior managers and were contrary to the employer’s good faith implementation of an effective antidiscrimination policy.” *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 864 (9th Cir. 2002) (citations omitted), *aff’d on other grounds, Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). It is premature to grant summary judgment on the issue of entitlement to punitive damages. As described above, factual disputes exist with respect to Mr. Soden’s status as a supervisor or senior manager and with respect to Applied Finishing timely implementation or distribution of its employee handbook which contained its antidiscrimination policies. Accordingly, the court denies Applied Finishing’s motion with respect to punitive damages under Title VII.

IV. CONCLUSION

As described above, the court GRANTS in part and DENIES in part Applied Finishing’s motion for summary judgment (Dkt. # 21) and Mr. Soden’s motion for summary judgment (Dkt. # 22).

Dated this 7th day of February, 2014.



JAMES L. ROBART
United States District Judge